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MAY 14 1946
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CLERK

No. 1098 84

In the Supreme Court of the United States

OCTOBER TERM, 1945

STATE OF OKLAHOMA, PETITIONER

v.

UNITED STATES CIVIL SERVICE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT

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In so far as here involved, Section 12 of the Hatch Act as amended (c. 640, 54 Stat. 767, 18 U. S. C. 61 *l*, Pet. 21–25) provides, in effect, that appointed officials and employees of state and local agencies whose principal employment is in connection with any activity financed in whole or in part by Federal funds, may not take "any active part in political management or in political campaigns". The Act requires the United States Civil Service Commission, upon receipt of information that an officer or employee may have violated the Act, to determine after notice and hearing whether a violation has occurred and, if so,

whether it "warrants the removal of the officer or employee". If the Commission finds that an individual has not been removed within thirty days after notice of a determination that his removal is warranted, or that he has been so removed and subsequently appointed to any other state or local office or employment in the same State, it is required to take steps which will result in the withholding from the State of federal funds equal to two years' compensation of the offending official.

In the instant case, the Civil Service Commission, after notice and hearing, has determined that France Paris, while a member of the State Highway Commission of Oklahoma, a state agency whose activities are financed in part by federal funds, violated the Act by concurrently serving as Chairman of the Democratic State Central Committee of Oklahoma, and that his violation warrants his removal from office. The State of Oklahoma has declined to remove him from office, and under Section 12 (c) of the Act, permitting review of the Commission's determination by "any party aggrieved", has unsuccessfully challenged the Commission's determination in the courts below.

The State's petition for a writ of certiorari presents four questions: (1) Whether Section 12 of the Hatch Act, as applied here, constitutes an interference with the internal affairs of the State

of Oklahoma in violation of the Tenth Amendment to the Constitution; (2) whether Section 12 of the Hatch Act embodies an unlawful delegation of power to the Civil Service Commission; (3) whether the political activities prohibited by Section 12 are confined to those which are "pernicious"; and (4) whether the Civil Service Commission abused its discretion in holding that France Paris' violation of the Hatch Act warranted his removal from office.

The second, third, and fourth questions do not present, we think, issues which call for review by this Court. They are fully dealt with by the Court of Appeals; and its decision with regard to them is clearly correct and does not conflict with the decisions of any other courts.

With respect to question 2, the delegation of authority to the Civil Service Commission to determine what constitutes "[an] active part in political management or in political campaigns", contained in Section 12 (a), is sufficiently limited by its terms to fall within the numerous prior decisions of this Court upholding similar delegations of authority. The Commission's power under Section 12 (b) to determine whether a particular violation "warrants the removal of the officer or employee by whom it was committed from his office or employment" is essentially a dispensing power, the exercise of which rests upon obvious considerations. The validity of the Com-

mission's scope of discretion is therefore, we think, beyond question. Section 15 of the Act (54 Stat. 757, 18 U. S. C. 61 *o*), moreover, constitutes a legislative adoption of prior determinations as to forbidden political activity and to that extent limits the subsequent power of the Commission to determine the content of the prohibition contained in Section 12 (a).

The attempt of the petitioner in connection with the third question presented to limit the scope of Section 12 to "pernicious" political activities by importing the word "pernicious" from the original Act's title (c. 410, 53 Stat. 1147) is plainly at odds with the carefully stated prohibition in Section 12 itself and can not prevail over the specific wording of the section. The fourth question of which review is sought, which is concerned only with the facts of this case, does not state an issue of general importance, and its determination by the court below was correct. Further review of the third and fourth questions is therefore unnecessary.

In regard to the first question stated above, it should be emphasized that, contrary to the assertions of the petitioner (Pet. 25–31), the Civil Service Commission's determination makes no attempt to invade the management of the State's internal affairs. No order that France Paris shall be removed from office has been issued or is authorized. The State is free to keep him in office or appoint him to some other if it

wishes, thereby incurring only the detriment of sacrificing an amount of federal money equal to twice his annual salary, since the State will not then have met the statutory condition for the receipt of this particular appropriated sum. The sole issue is whether, in light of its statutory purpose, an administrative determination entailing this consequence of non-compliance violates the Tenth Amendment. That it does not has been held in the previous lower-court decisions which have passed on the matter. *Stewart* v. *United States Civil Service Commission,* 45 F. Supp. 697 (N. D. Ga.); *Neustein* v. *Mitchell,* 52 F. Supp. 531 (S. D. N. Y.); *Hutchins* v. *United States Civil Service Commission,* Civil Action No. Phx. 515, affirmed without opinion, January 4, 1945 (D. Ariz.). Section 12 is manifestly an attempt to prevent the exercise of the political power which accrues to the dispenser of Federal funds, and the sanction which it applies is adapted to the problem to be met. It would seem, therefore, to satisfy the test recently laid down in *Steward Machine Co.* v. *Davis,* 301 U. S. 548 at 590, that a tax (here an appropriation act provision) imposed by Congress is valid if a State may avoid the detriment otherwise flowing from it by taking prescribed action which is related "in subject matter to activities fairly within the scope of national policy and power".

We concede, nevertheless, that a condition in a Federal appropriation act may be invalid because

it violates a constitutional limitation (*cf.* the brief for the petitioner in *United States* v. *Lovett, Watson,* and *Dodd,* Nos. 809–811, this Term) and that whether it does or not may present a question of importance. Here, Section 12 of the Hatch Act is an exercise of the power to condition appropriations, the validity of which is not completely determined by precedent. Although legislation providing for grants-in-aid to the States typically takes the form of appropriations conditioned upon prescribed action by the States (e. g., Sections 6, 8, 8a, 9, 12, 14, and 15 of the Federal Highway Act, c. 119, 42 Stat. 212, as amended, 23 U. S. C. 1 *et seq.*; Sections 2, 4, 303, 402, 404, 503, 505, 513, 515, 1002, and 1004 of the Social Security Act, c. 531, 49 Stat. 620, 42 U. S. C. 301 *et seq.*), the validity of such a condition attached to an appropriation has not been squarely determined by this Court. An issue involving this type of question was held to be separable and was left undecided in *Steward Machine Co.* v. *Davis, supra* (301 U. S. at p. 598). Actually decided in that case was the power of Congress to levy taxes upon citizens of a State, abatable upon compliance by the State with certain prescribed conditions. See also *Florida* v. *Mellon,* 273 U. S. 12.

Although we think Section 12 of the Hatch Act and the Commission order clearly constitutional, in view of the importance of the Section to the States and to the effectuation of the policy em-

bodied in the Act as a whole, we do not oppose the issuance of a writ of certiorari in this case limited, so far as the questions presented in the petition are concerned, to that of the validity of the Civil Service Commission's order under the Tenth Amendment.

Another question arises, which the respondent suggests that the Court may care to review if a writ of certiorari issues, and that is whether a justiciable controversy is presented. *Massachusetts* v. *Mellon*, 262 U. S. 447, and *Florida* v. *Mellon*, 273 U. S. 12, have, of course, circumscribed the extent to which a justiciable controversy may be presented by a State in challenging a federal appropriation act provision. Here, however, the case has come into court by virtue of a statutory provision for judicial review of the legality of the Civil Service Commission's determination, upon the petition of a State as well of other parties to the administrative proceeding. See Section 12 (b) and (c) of the Hatch Act, 18 U. S. C. 61 *l* (b) and (c). That there were Congressional doubts concerning the validity of the judicial review provisions of Section 12 (c) is indicated by the final sentence of the sub-section, saving the effectiveness of any Civil Service Commission determination as to which judicial review is defeated by invalidity of the sub-section ~~which is~~ WHEN applied to review by a particular party. We think that the validity of Section 12 (c) as applied to review at

the suit of a State presents a question which the Court may care to consider if the writ is granted.

Respectfully submitted,

J. HOWARD MCGRATH,
Solicitor General.

MAY, 1946.

U. S. GOVERNMENT PRINTING OFFICE: 1946